Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 31 1997
Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	IB Docket No. 96-261
International Settlement Rates	)	

REPLY COMMENTS OF THE REGIONAL TECHNICAL COMMISSION ON TELECOMMUNICATIONS OF CENTRAL AMERICA

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March 31, 1997

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SUMMARY

Commenters from around the globe have joined with the Regional Technical Commission on Telecommunications of Central America ("COMTELCA") to urge the FCC to abandon the accounting rate proposals contained in the Notice.

Many commenters agree with COMTELCA that services such as call-back and call re-origination -- which the FCC has actively promoted -- have greatly exacerbated the United States' traffic imbalance. At the same time, these services have resulted in significant financial harm to non-U.S. carriers, making it far more difficult for them to develop their infrastructures. The FCC's proposal to unilaterally impose accounting rate reductions on non-U.S. carriers would only compound this harm. Moreover, there is no reason to believe that U.S. carriers would pass along to U.S. consumers any reduced cost that might result from lower accounting rates. Indeed, despite the steady decrease in accounting rates over the past decade, U.S. collection rates for international service have continually increased.

Many of the commenters also share COMTELCA's view that the pricing methodology proposed in the Notice is deeply flawed. In particular, they object to the FCC's proposal to use income as the sole criterion for setting accounting rates. Several parties also emphasize that the incremental cost of terminating international traffic in less-developed countries is much higher than in the United States. In light of these cost differences, COMTELCA agrees with those commenters that argue that the FCC should implement a system of asymmetrical accounting rates.

There also is widespread agreement that the only appropriate means to adopt accounting rate reform is through bilateral or multilateral negotiations. As several parties correctly observe, the FCC's unilateral approach -- which would require U.S. carriers to unilaterally breach the terms of their accounting rate agreements and settle traffic at rates unilaterally imposed by the FCC -- would violate the requirement that changes to accounting rates be made by "mutual agreement." A number of commenters further explain that the FCC's proposed approach would have significant adverse policy consequences, and could provoke retaliation against U.S. carriers.

Contrary to AT&T's assertions, the FCC cannot regulate the rates that carriers outside the United States charge their U.S. correspondents to terminate international traffic. These rates are embodied in binding, privately negotiated contracts. The FCC lacks authority to modify the terms of such inter-carrier agreements. This is especially true when, as here, one of the parties is a non-U.S. carrier. The Communications Act does not -- and as a matter of international law cannot -- provide the FCC with jurisdiction over these carriers.

The FCC should reject AT&T's proposal to adopt a transition plan that is even shorter, and even less flexible, than the one proposed in the Notice. Rather, as many commenters recognize, any transition period must be tied to each country's timetable for rate rebalancing. Requiring drastic accounting rate reductions prior to tariff rebalancing would only increase the attractiveness of call-back offerings, thereby exacerbating the U.S. settlements deficit. Moreover, a "flash-cut" to radically lower accounting rates would deprive developing countries of the revenues needed to upgrade their telecommunications infrastructures.

The COMTELCA member countries have made significant progress in liberalizing their telecommunications markets and in reducing accounting rates. The FCC should work to facilitate these efforts, rather than seeking to unilaterally impose unrealistic, inflexible obligations on carriers that are not subject to its jurisdiction.

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The Regional Technical Commission on Telecommunications of Central America ("COMTELCA")[1] hereby replies to the comments filed in response to the Federal Communications Commission's ("FCC's") Notice of Proposed Rulemaking regarding the international accounting rates.[2]

I. THE FCC'S ACCOUNTING RATE PROPOSAL HAS GENERATED WORLDWIDE OPPOSITION

Commenters from around the world have expressed their strong opposition to the FCC's accounting rate proposals. Indeed, the U.S. international carriers stand nearly alone in supporting the FCC's proposals. The commenters make three fundamental points: the United

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1 COMTELCA's members include the Costa Rican Institute of Electricity ("ICE"), the Guatemalan Telecommunications Company ("GUATEL"), the Honduran Telecommunications Company ("HONDUTEL"), the National Telecommunications Administration of El Salvador ("ANTEL"), the Nicaraguan Telecommunications Company ("ENITEL"), and the National Telecommunications Institute of Panama ("INTEL").

2 See International Settlement Rates, Notice of Proposed Rulemaking, IB Docket No. 96-261, FCC 96-484 (rel. Dec. 19, 1996) ("Notice").

States' traffic imbalance is the result of FCC policies promoting promising call-back and re-origination; the pricing methodology proposed in the Notice is deeply flawed; and the appropriate means to address accounting rates is through bilateral and multilateral negotiations. In light of the unprecedented -- and near unanimous -- opposition, the FCC should abandon the proposals contained in the Notice.

A. The United States' Traffic Imbalance Is Caused By the FCC's Policies

The overwhelming majority of the parties filing comments agree that the United States' settlements deficit is being caused by the FCC's own policies.[3] Like COMTELCA, many commenters explained that services such as call-back and call re-origination -- which the FCC has actively promoted -- have greatly exacerbated the United States' traffic imbalance.[4]

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[3] A number of commenters correctly observe that the United States' traffic imbalance also is the result of socio-economic factors -- such as the United States' high level of economic development, its high telephone penetration rate, and the presence of a large immigrant population. See, e.g., Cable & Wireless Comments at 21-22; Telecomunicaciones Internacionales de Argentina Telintar S.A. ("Telintar") Comments at 16; Telefonos de Mexico, S.A. de C.V. ("Telmex") Comments at 15.

[4] See COMTELCA Comments at 9-11; Hispanic-American Association of Research Centers and Telecommunications Companies ("AHCIET") Comments at 6 ("[T]he FCC's decision to authorize and support 'call back' and 'call reorigination' services . . . has distorted 'historical' traffic relations between countries."); Telintar Comments at 5 & Chart 1 ("[T]he growth of international call-back has significantly increased the international traffic imbalance."); Telefónica del Perú Comments at 9-11; Deutsche Telekom AG Comments at 2-3, 7-8.; France Telecom Comments at 6-7 & nn.14-15; RPOAs of Korea Comments at 4; GTE Comments at 5-6 & n.9; Pacific Bell Comments at 3-5.

On the U.S.-Singapore route, for example, these services have tipped the ratio of inbound to outbound traffic "from 1:1 to the current level of 3:1, with the result that Singapore Telecom is now a net recipient of settlement payments from U.S. carriers." Singapore Telecommunications Ltd. Comments at 4. Even worse, on the Hong Kong-

Telmex, for example, estimates that international traffic "originated" in the United States accounts for a full five percent of the traffic that it receives from the United States.[5] Telintar similarly explained that call-back services are largely to blame for the inordinate increase in the volume of traffic from the United States to Argentina.[6] In light of this data, it is clear that United States' settlements deficit is "self-inflicted."[7]

At the same time that they have exacerbated the Unites States' settlements deficit, call-back and re-origination services have resulted in significant financial harm to non-U.S. carriers. In its initial comments, COMTELCA explained that call-back services shift collection revenues to U.S. carriers and thereby deprive non-U.S. carriers of payments to which they are lawfully entitled.[8] Similarly, the practice of "re-originating" calls in the United States deprives terminating country carriers of settlement revenues because such calls are settled at the lower accounting rate in effect between the United States and the terminating country, rather than the higher accounting rate in effect between the originating and terminating countries.[9]

U.S. route, call-back and reorigination have caused the traffic imbalance to skyrocket from 1.2:1 to 6:1. See Hongkong Telecom Comments at 8, 9.

[5] See Telmex Comments at 15 n.32.

[6] Between 1993 and 1995, the volume of traffic from the United States to Argentina grew by 83.6 percent. By comparison, the rate of growth for the rest of the world was only 29.2 percent. See Telintar Comments at 33.

[7] Hongkong Telecom Comments at 5.

[8] See COMTELCA Comments at 10.

[9] See Hongkong Telecom Comments at 4.

By depriving them of revenues to which they are entitled, call-back and re-origination have made it far more difficult for non-U.S. carriers to develop their infrastructures.[10] The FCC's proposal to unilaterally impose accounting rate reductions on non-U.S. carriers would only compound this harm. As Telefónica del Perú explained, "rapid, drastic reductions in accounting rates are almost certain to reduce the total revenues of carriers . . . thereby impairing their continued ability to develop their infrastructure."[11]

While call-back has harmed non-U.S. carriers, it has provided substantial benefits to U.S. carriers. As KDD explained, call-back services are "premium services" with rates higher than the international direct dial rates charged by U.S. carriers.[12] As a result, these services have generated substantial revenues for U.S. carriers in the form of direct payments from end-users. Call-back services also entitle U.S. carriers to a greater share of "proportionate" return traffic, and thus, significant settlements payments.[13] This return traffic, Panama notes, is especially lucrative because U.S. carriers charge foreign carriers approximately five times their cost of providing terminating access to the U.S.[14]

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[10] Panama notes that international toll revenues comprise a much larger percentage of all toll revenues in developing countries than they do in the United States. See Republic of Panama Comments at 32. GTE notes that settlements payments constitute more than 50 percent of total telecommunications revenues in many developing countries. GTE Comments at 20; see also France Telecom Comments at 13-14; GTE Comments at 17-21.

[11] Telefónica del Perú Comments at 12.

[12] Kokusai Denshin Denwa Co. Ltd. ("KDD") Comments at 9.

[13] See Hongkong Telecom Comments at 8.

[14] See Republic of Panama Comments at 31.

Call re-origination and third-country calling have provided even greater benefits to U.S. carriers. As Telintar explained, these services entail the routing of "traffic from one non-U.S. country to another non-U.S. country through the United States."[15] As a result, these services generate additional collections for U.S. carriers and entitle them to an even greater share of proportionate return traffic and settlement payments.

The FCC's support for call-back and call re-origination might be understandable if these services were benefitting U.S. consumers. As the FCC has recognized, however, the U.S. carriers have not passed along these benefits to U.S. consumers.[16] Nor is there any reason to believe that U.S. carriers will pass along to U.S. consumers any reduced cost that might result from lower accounting rates. As Pacific Bell correctly observes, "U.S. collection rates bear little relationship to foreign accounting rates."[17] Indeed, despite the steady decrease of accounting rates over the past decade, "collection rates have continually increased."[18]

In light of this evidence, COMTELCA agrees with Telefónica del Perú that "the lack of full competition in the U.S. outbound international telecommunications market -- rather

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[15] See Telintar Comments at 5.

[16] See Notice at 4 n.10 ("The rise of transit traffic may benefit U.S. carriers through increased revenues, but it does not fundamentally change the adverse impact on U.S. consumers of the growing imbalance of outbound versus inbound traffic.").

[17] Pacific Bell Comments at 3; see also KDD of Japan notes that the accounting rate on the U.S.-Japan route decreased by approximately 53 percent from 1990-95, yet AT&T's direct dial rate to Japan increased by 13 percent. KDD Comments at 10. The same pattern exists with regard to U.S.-Hong Kong traffic. See Hongkong Telecom Comments at 11; COMTELCA Comments at 9-11.

[18] Pacific Bell Comments at 4-5 & n.14.

than high accounting rates -- is the primary cause of high collection rates in the United States."[19] Therefore, as the Government of the United Kingdom observed, the "best way of achieving reductions in collection rates in the US must be to allow as much competition in the international market as possible from carriers both within and from outside the U.S."[20]

B. The Comments Highlight the Significant Flaws in the Pricing Methodology Proposed in the Notice

Many of the commenters object to the FCC's proposal to use income as the sole criterion for classifying countries for purposes of applying its benchmarks. In its comments, Panama pointed out that the FCC's income-only approach "fail[s] to recognize fundamental differences between countries such as their economic, political, social and technological development."[21] As a number of other commenters correctly observed, application of the FCC's income-only classification methodology could produce arbitrary results.[22] Panama, for example, explained that the FCC's approach:

> is arbitrary because it does not distinguish between fully competitive markets, those markets which are being introduced to competition and those markets which have no plans to liberalize their telecommunications sector. For example, Panama, Iran, Saudi Arabia and Tonga have all been placed in the "middle"

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[19] Telefónica del Perú Comments at 10.

[20] Comments of the United Kingdom's Government at 3.

[21] Republic of Panama Comments at 22-23; see France Telecom Comments at 14.

[22] KDD pointed out that even though Japan and the United States have similar per-capita incomes, "the cost of living in Japan is 82 percent higher than in the United States." On this basis, KDD concluded that the differences among countries lumped together in the same income category are "so significant as to rebut any facile assumptions that such countries incur similar costs" in terminating international traffic. KDD Comments at 15-16.

> category, despite the fact that these countries have nothing in common . . . such as the distribution of wealth within a country and its political will to promote liberalization, competition and free enterprise.[23]

Several other parties emphasized that the incremental cost of terminating international traffic in less-developed countries is much higher than in the United States. To illustrate this point, Telefónica Internacional de España estimated that U.S. carriers charge international accounting rates that, on average, generate a net profit of 55 cents per minute -- nearly twice as large a profit margin as that experienced by foreign carriers.[24] "In light of these cost differences," COMTELCA agrees with the Republic of Korea, Telefónica del Perú, and Telintar, "that the FCC should implement a system of asymmetrical accounting rates."[25] As explained in COMTELCA's initial comments, such a system would be entirely consistent with the FCC's stated belief that accounting rates should reflect the actual cost of terminating international traffic.[26]

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[23] Republic of Panama Comments at 22-23.

[24] Telefónica Internacional de España S.A. (Telefónica-España) Comments at 24-32; see also Republic of Panama Comments at 31 (U.S. carriers charge foreign carriers approximately five times their cost of providing terminating access to the U.S.).

[25] Telefónica del Perú Comments at 15 (emphasis added); see also Comments of the RPOAs of the Republic of Korea at 3 ("[I]f its aim is to achieve a true cost-oriented settlement rate, the FCC has to clarify the US benchmark and be willing to apply a non-50:50 proportionment.").

[26] See COMTELCA Comments at 15.

C. The FCC Should Seek to Achieve Accounting Rate Reform Through Bilateral and Multilateral Negotiations, Rather Than Unilateral Action

The commenting parties strongly opposed the FCC's proposal to unilaterally impose lower accounting rates on non-U.S. carriers. As several of these parties correctly observed, the FCC's unilateral approach to accounting rate reform "would violate the binding regulations of the International Telecommunication Union."[27] More specifically, Telefónica del Perú explained that "[t]he FCC's proposal -- which would require U.S. carriers to unilaterally breach the terms of their accounting rate agreements and settle traffic at rates unilaterally imposed by the FCC -- would directly violate the requirement that changes to accounting rates be made by 'mutual agreement'."[28]

In addition to being unlawful, a number of commenters explained that the "tyrann[ic]"[29] approach to accounting rate reform embodied in the Notice also would have significant adverse policy consequences. International telecommunications is a "two way street." No matter how well-off U.S. carriers are, they simply cannot provide international service without the cooperation of their foreign correspondents. Adoption of the FCC's proposals, GTE warned, would:

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[27] See Telintar Comments at 12.

[28] Telefónica del Perú Comments at 8, 9. Article 1.5 of the ITU Regulations makes clear that "the provision . . . of international telecommunications services" must be pursuant to mutual agreement between administrations [or recognized private operating agencies ("RPOAs")]." Article 6.2.1, moreover, expressly states that, "[f]or each applicable service in a given relation, administrations [or RPOAs] shall by mutual agreement establish and revise accounting rates to be applied between them . . . ." ITU Regulations, Art. §§ 1.5, 6.2.1 (emphasis added).

[29] Comments of Telecommunications Services of Trinidad and Tobago Limited at 2.

> undermine the bilateral nature of international telecommunications relationships, disrupt the emerging trend toward competition, eliminate the time necessary for developing countries to undertake necessary rebalancing of tariffs and thereby postpone progress toward the achievement of universal service and access capabilities upon which the Global Information Infrastructure is predicated.[30]

Telintar similarly reasoned that the FCC's "high-handed" approach would entrench the negotiating position of U.S. carriers at the FCC's benchmark rate and, as a result, make mutual agreement "difficult, if not impossible."[31]

Other commenters cautioned that the FCC's unilateral approach to accounting rate reform would provoke retaliation against U.S. carriers. SBC Communications predicted that "[a]ny U.S.-based regulatory body's attempts to force accounting policies and terms upon other sovereign nations or their citizens is unlikely to be well-received."[32] Telmex similarly stated that:

> to the extent that foreign administrations view the proposal as an attempt to impose a U.S. policy extraterritorially -- and indications are that at least some countries do -- they could respond by imposing burdensome obligations on U.S. carriers seeking to compete there or, as the Commission itself proposes here, by barring U.S. carriers from the country's market altogether. This result is exactly the opposite of what the Commission intends to achieve in this proceeding . . . .[33]

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[30] GTE Comments at 14-15.

[31] Telintar Comments at 35.

[32] SBC Communications Comments at 4.

[33] Telmex Comments at 19-20; see also France Telecom Comments at 5 ("FT cautions the Commission that a unilateral approach will be perceived as insensitive to economic and political realities outside the US. Indeed, the Commission's proposals may forestall or cause a loss of momentum to current reform initiatives in international fora.").

In its initial comments, COMTELCA explained that the only appropriate "means to adopt accounting rate reform is through multilateral consensus." Many parties reached this same conclusion. AHCIET, for example, argued that accounting rate reform "must be done within the framework of international agreements (ITU, WTO), and must always respect each country's internal legislation."[34] Other commenters from around the globe -- including Telefónica del Perú, Telintar, Telia AB, Deutsche Telekom, the RPOAs of Korea, Hongkong Telecom, and KDD of Japan -- also joined COMTELCA in supporting a multilateral approach centered at the ITU.[35] According to France Telecom, the ITU's Telecommunication Standardization Sector Study Group 3 has "reached an important turning point" and is now committed to cost-oriented accounting rates. ITU Study Group 3 is set to meet again in May 1997 with a "relatively rapid timetable" having been established for accounting rate reductions.[36] In light of this progress, the FCC should continue to pursue a consensual solution to the problem of above-cost accounting rates through work being done in international fora such as the ITU.

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[34] AHCIET Comments at 6.

[35] Telefónica del Perú Comments at 13-15; Telintar Comments at 12 ("Although the Notice claims that the FCC supports multilateral consensus on accounting rate reform and the efforts of international organizations such as the ITU, its proposal reveals a willful disregard for the sovereignty of other nations."); Deutsche Telekom AG Comments at 8-9; Comments of Telia AB at 4; RPOAs of the Republic of Korea Comments at 3-4; Hongkong Telecom International Comments at 29 & n.35; KDD Comments at 23.

[36] France Telecom Comments at 8-9.

II. AT&T STANDS ALONE IN ADVOCATING EVEN HARSHER MEASURES THAN THOSE PROPOSED BY THE FCC

A. The FCC Plainly Lacks Jurisdiction Over Carriers Outside The United States

In its comments, AT&T (joined, in some instances, by Sprint) argues that the FCC has the authority under the Communications Act to abrogate U.S. carriers' accounting rate agreements with non-U.S. carriers, notwithstanding the fact that these agreements are embodied in privately negotiated contracts.[37] As demonstrated below, this claim is without merit. The FCC is utterly devoid of jurisdiction over non-U.S. carriers and, therefore, is powerless to deprive them of their contractual rights.

1. The FCC Does Not Have Authority to Regulate International Accounting Rates

AT&T first argues that Section 201(b) of the Communications Act authorizes the FCC to regulate international accounting rates. Section 201(b) gives the FCC authority to require common carriers subject to its jurisdiction to provide international communication services to their domestic customers at rates that are "just and reasonable." This provision, however, in no way gives the FCC the authority to regulate the terms pursuant to which domestic U.S. carriers do business with their foreign suppliers.[38]

AT&T goes on to observe that Section 205 of the Communications Act authorizes the FCC "to declare that certain 'charges' and 'practices' are unreasonable and unlawful, to

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[37] AT&T Comments at 46; see also Sprint Comments at 5-6;

[38] See Telintar Comments at 27; Telefónica-España Comments at 6-16.

order carriers to 'cease and desist' from participating in such practices, and . . . to prescribe what particular 'charges' and 'practices' carriers may adopt."[39] The authority granted to the FCC by Section 205 of the Act, however, is limited to the regulation of rates that domestic carriers subject to the FCC's jurisdiction may charge to their U.S. customers. Nothing in Section 205 suggests that the FCC may establish the prices that a U.S. carrier may charge a foreign supplier. In any case, Section 205 requires that any rate prescriptions follow a hearing and be based on a FCC finding that the proposed rate is just and reasonable. The Notice does not propose to afford foreign carriers either of these procedural protections.[40]

2. The FCC Does Not Have The Authority To Abrogate The Terms Of Private Inter-Carrier Agreements

AT&T next contends that the FCC can abrogate the terms of the accounting rate agreements between a U.S. carrier and its foreign correspondent because the agency has statutory authority over "inter-carrier" agreements. AT&T bases this assertion on Section 211 of the Communications Act, which requires carriers over which the FCC has jurisdiction to file copies of all contracts, agreements, or arrangements with other carriers. AT&T argues that "[t]his mandatory filing requirement would be inexplicable if Congress had not envisioned that the Commission could review contracts filed with it to ensure that their terms comport with the public interest."[41] AT&T's arguments are not sound.

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[39] AT&T Comments at 47-48.

[40] Telintar Comments at 28-29.

[41] AT&T Comments at 49.

As an initial matter, the Notice does not rely on Section 211 as the basis for the FCC's purported authority to "establish" international accounting rates and "approve" international operating agreements. In any case, Section 211 merely requires that carriers "file with the Commission copies of all contracts . . . with other carriers."[42] Nothing in this provision authorizes the Commission to regulate the terms of those agreements. Indeed, the Commission has never used Section 211 as justification for an attempt to alter the terms of an agreement between a U.S. carriers and its foreign correspondent.

AT&T's effort to invoke the Sierra-Mobile doctrine also is unavailing.[43] This doctrine is based on two Supreme Court decisions interpreting the Federal Power Act and the Natural Gas Act. Despite certain similarities between these statutes and the Communications Act, there is a significant difference: the energy statutes expressly authorize the relevant federal agency to regulate privately negotiated contracts, while the analogous provision in the Communications Act does not.[44] Consequently, as the Third Circuit has recognized, the only applicability that the Sierra-Mobile doctrine has in the telecommunications area is to bar a

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[42] 47 U.S.C. § 211(a).

[43] The Sierra-Mobile doctrine states that, under the Federal Power Act and the Natural Gas Act, a regulatory agency may modify the terms of a privately negotiated contract if, after investigation, it determines that the terms of the contract would adversely affect the public interest.

[44] See Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250, 1279 (3d Cir. 1974) ("Unlike the Natural Gas Act, there is no provision in the Communications Act expressly authorizing the Commission to regulate . . . privately negotiated contracts."). This decision is considered the leading case governing the applicability of the Sierra-Mobile doctrine to the Communications Act.

telecommunications carrier from unilaterally modifying a contract by filing a conflicting tariff, an issue entirely unrelated to the FCC's proposal.[45]

3. The FCC Does Not Have Authority Over Contracts Between a U.S. Carrier and Its Foreign Correspondent

AT&T goes on to claim that the FCC's supposed "authority" to abrogate accounting rate agreements is not diminished by the fact that one of the parties to the contract is a non-U.S. carrier. AT&T relies on Section 201 of the Communications Act, which states that "nothing in this Act . . . prevent[s] a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act . . . if the Commission is of the opinion that such contract is not contrary to the public interest." AT&T argues that the phrase "any common carrier not subject to this Act" applies to foreign carriers, and that the authority to make a public interest finding gives the FCC plenary power to regulate all aspects of the relationship between a U.S. carrier and its foreign correspondent. There is no basis for AT&T's claim.

The FCC consistently has applied Section 201(b) to U.S. carriers that operate on a purely intrastate basis.[46] Even if this provision were applicable to contracts involving foreign

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[45] Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475, 1483-84 (D.C. Cir. 1994). The case cited by AT&T applying the Sierra-Mobile doctrine to the Communications Act is unconvincing. While the court in Western Union v. FCC (815 F.2d 1495) assumed that the Sierra-Mobile doctrine extends fully to the Communications Act, it provides no analytical support for this proposition.

[46] See, e.g., Western Union Telegraph Co., 75 F.C.C. 2d 461, 477 n.12 (1979) (interconnection agreement between Western Union and foreign carriers not covered by Section 201(b)); see also id. at Attachment A, ¶¶ 4-6.

carriers, it would do no more than to allow the FCC to direct a U.S. carrier not to enter into, or to cease continuing to operate under, an agreement with a non-U.S. carrier. Nothing in this provision remotely authorizes the Commission to direct a U.S. carrier to breach an existing agreement with its foreign correspondent.

AT&T also relies on the 1943 district court opinion in RCA Communications v. United States.[47] Contrary to AT&T's suggestion, the RCA case actually demonstrates that the FCC is without power to regulate international accounting rates. RCA holds that, if the FCC believes that the rate that a U.S. carrier has agreed to pay its foreign correspondent to terminate international traffic is excessive, the agency's sole recourse is to order the U.S. carrier to lower the rates that it charges its U.S. customers for the international service. The U.S. carrier must then renegotiate its agreement with its foreign correspondent, or absorb any shortfall.

The RCA court expressly recognized that the Commission lacks the authority to regulate the rates paid by U.S. carriers to their foreign correspondents. In order to modify such rates, the court stated, it "is necessary to secure the consent of the company or administration which operates the other end of the jointly operated circuit, subject to the regulations of its government."[48] This is consistent with the U.S. Supreme Court's decision in Regents of University System of Georgia v. Carroll, which held that the FCC has no power under the Act

[47] 43 F. Supp. 851 (S.D.N.Y. 1942) ("RCA").

[48] Id. at 853.

to determine the validity of contracts between holders of FCC authorizations and third parties such as the foreign correspondent carriers.[49]

4. The FCC Does Not Have Jurisdiction Over Foreign Carriers

AT&T goes so far as to make the extraordinary claim that the FCC has jurisdiction to regulate directly the accounting rates charged by foreign carriers. AT&T relies principally on Section 2(b) of the Communications Act. That provision states that Sections 201 to 205 of the Act -- which contain the basic grant of FCC ratemaking authority -- are applicable to "any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier."[50] Because non-U.S. carriers "physically connect" their circuits to those of U.S. carriers, AT&T asserts this provision subjects then to the FCC's jurisdiction.

AT&T's contention is absolutely insupportable. Section 2(b) does not -- and, as a matter of international law, cannot -- extend the FCC's jurisdiction extraterritorially. Rather, the type of carrier contemplated by Section 2(b) is a U.S. carrier whose facilities are exclusively intrastate, but which engages in international communications solely by interconnecting to a carrier subject to the Commission's jurisdiction.[51]

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[49] See e.g., Telefónica-España Comments at 12-15; Telefónica del Perú Comments at 7-8 (citing Regents of the University System of Georgia v. Carroll, 338 U.S. 586, 602 (1950) ("We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between [entities subject to its jurisdiction] and others.")).

[50] 47 U.S.C. § 152(b).

[51] See H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934) (Section 2(b) applicable to "independent telephone companies engaged in interstate or foreign commerce.").

The FCC's 1979 decision in Western Union, on which AT&T further relies, is simply inapposite. Much as AT&T may wish it were otherwise, that decision did not suggest that the agency has authority over carriers located outside the United States. It merely held that the FCC could require a U.S. carrier providing international service to file tariffs for the end-to-end service, even though some of the facilities that the U.S. carrier uses to terminate its traffic belong to carriers outside the United States.[52] In any case, whatever the FCC may have suggested about the scope of its jurisdiction in the Western Union decision, that language is entitled to no weight in light of the FCC's recognition -- just last year -- that "we do not have jurisdiction over [a] foreign carrier."[53]

5. The Proposals in the Notice Would Violate the Treaty United States' Obligations Under the ITU

Finally, AT&T argues that the ITU regulation requiring that international telecommunications services be provided "pursuant to mutual agreement" does not interfere with the FCC's authority to regulate international accounting rates in order "to protect the American 'public interest' and to prohibit 'unreasonable practices' and 'charges'."[54] AT&T specifically

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[52] See Western Union Telegraph Co., 75 F.C.C.2d at 475 (emphasis added).

[53] Market Entry and Regulation of Foreign-Affiliated Entities, 1 Comm. Reg. (P&F) 459, at ¶ 105 (1995). NTIA agrees:

> Foreign governments . . . maintain independent sovereign authority over the foreign end of a call . . . . [T]he Commission cannot compel foreign entities to accept accounting rates prescribed by the Commission for U.S. carriers . . . .

Comments of National Telecommunications and Information Administration, CC Docket No. 90-337, at 17 (filed Oct. 12, 1990).

[54] AT&T Comments at 57.

relies on Reservation No. 69 to the ITU Treaty, in which the United States "reserve[d] its rights to take whatever action it deems necessary, at any time, to protect its interest."

AT&T's argument again is unavailing. The FCC does not have the authority to speak for the United States regarding its national interests. Moreover, it is highly unlikely that the price terms contained in a contract between a U.S. carrier and its foreign correspondent could ever rise to the magnitude of a threat to the national interests of the United States. To conclude otherwise would render the ITU Regulations a nullity.[55]

B. The Applicable Settlement Rates Should Not Be Based on the Lower of the Country-Specific Tariff Component Price or the Benchmark Category

While most of the world agrees that the FCC's proposals go well beyond the agency's authority, AT&T alone argues that the FCC has not gone far enough. AT&T recommends that the upper end of each country's benchmark range be set at the lower of either that country's tariff component price or its relevant benchmark range. AT&T argues that if the upper end of the range is based on an average tariff-component price, many countries with tariff-component prices below the average will be able to continue overcharging U.S. carriers.[56]

The FCC should reject AT&T's proposal. As is the case in the United States, tariffs in many countries do not reflect the actual cost structure of the underlying service.

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[55] The Vienna Convention states that a party to a treaty is prohibited from formulating a reservation that "is incompatible with the object and purpose of the treaty." Vienna Convention, art. 19(c) See also Restatement (Third) of The Foreign Relations Law of the United States, § 313(1)(c) (1986). Reservation No. 69 should not, therefore, be interpreted as rendering the ITU Treaty meaningless.

[56] See AT&T Comments at 14-17.

Indeed, many services may be priced below cost to promote universal service goals. As a result, there is no basis for the FCC to assume that these tariffs provide a reliable indication of the cost of terminating international calls in the tariffing country. Therefore, if the FCC were to require U.S. carriers to pay their foreign correspondents no more than the tariffed component price, the U.S. carrier would not be compensating its foreign correspondent for the cost of providing service. The FCC plainly has no authority to adopt such a confiscatory approach.

C. There Is No Support For Imposing Shorter Transition Periods And Less Accounting Rate Flexibility

In its comments, AT&T -- again alone among the commenters -- proposes that the Commission adopt shorter transition periods for the implementation of its benchmarks, and that the agency apply its benchmark regime with even less flexibility than proposed in the Notice. Specifically, AT&T argues that all countries should be required to satisfy the benchmark requirements by January 1, 2000, and that all non-U.S. carriers be required to immediately initiate proportionate annual reductions.[57] AT&T further argues that the FCC should not provide any "additional flexibility" to carriers from developing countries -- even if that country is undertaking competitive reforms and moving its accounting rates towards costs.

AT&T's proposal should be rejected out-of-hand. As Telefónica Internacional de España explains, any transition period must be tied to each country's timetable for rate rebalancing.[58] Requiring drastic accounting rate reductions prior to tariff rebalancing would

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[57] See AT&T Comments at 18-19.

[58] See Telefónica-España Comments at 65 ("[T]he only acceptable timetable is one that is tied to rate rebalancing.").